IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH, JAIPUR

:: **J U D G M E N T** ::

D.B. CIVIL SPECIAL APPEAL(W)NO.1232/2006

Mukund Bihari Sharma
Vs.
Shri Satya Narayan

DATE OF JUDGMENT :: 02-04-2007

:: **P R E S E N T** ::

HON'BLE THE CHIEF JUSTICE SHRI S.N.JHA
HON'BLE SHRI JUSTICE MOHAMMAD RAFIQ

Shri R.P. Garg, for the appellant.
Dr. P.C. Jain, for the respondent.

This appeal is directed against the order of the learned Single Judge dated 13/10/2006 in S.B. Civil Writ Petition no.6567/2006 dismissing the writ petition of the appellant. The appellant had filed the writ petition challenging the order of the trial court [Additional District Judge(Fast Track), Bandikui] dated 26.7.2006 in Civil Appeal no.1/2006 rejecting his application for substitution.

Brief facts of the case are that one Narbada Devi, grand mother of the appellant, filed suit no.190/1985 in the court of Additional Civil Judge, Dausa

for eviction of the respondent on the ground of personal necessity of the appellant. The suit was dismissed on 16.1.1996. During pendency of the appeal which Narbada Devi preferred, on 23.4.2005 she executed a Will in respect of the property in question in favour of the appellant. The Will was duly attested by the Notary Public. Soon after, on 21.6.2005 she died. On 11.7.2005 the appellant filed application under Order 22 Rule 3 read with Order 1 Rule 10 further read with Section 151 of the Civil Procedure Code for his substitution in place of Narbada Devi. The trial court took the view that as the appellant had not obtained probate of the Will, he was not entitled to be substituted in place of Narbada Devi. Observing further that period of ninety days had expired and the legal representatives of Narbada Devi had not been brought on record, the court held that the appeal had abated on expiry of the period of ninety days.

The case of the appellant is that the provisions of the Section 213 of the Indian Succession Act, 1925 in terms of which probate or letters of administration is to be mandatorily obtained in order to establish one's rights as legatee under a Will, are not applicable in the State of Rajasthan. In this regard reliance was placed on Mst. Jadav Vs. Ram Swarup, 1960 RLW 685 and Sultan Singh Vs. Brijraj Singh, 1997(1)WLC 368. View to this effect was taken by a Division Bench in Sunderlal and Teeja Vs. Nena, D.B. Civil Regular First

Appeal No.83 of 1952 decided on 16.11.1954 referred to in the case of Mst. Jadav Vs. Ram Swarup(Supra). The ground of rejection of the application for substitution therefore does not appear to be in accordance with law.

Dr. P.C. Jain, counsel for the respondent submitted that the writ petition before the Single Judge itself was not maintainable. Referring to clause (k) of Order 43 Rule 1 of the CPC, it was submitted that any order refusing to set aside abatement or dismissal of a suit under Order 22 rule 9 is appealable, and therefore the appellant was required to prefer appeal and the writ petition was not maintainable. The submission is totally misconceived.

From a plain reading of the order it is clear that what was being disposed of by the order was the application of the appellant for substitution. The latter part of the order holding that the appeal had abated was merely consequential. It is well known that suit or appeal, as the case may be, abates as a matter of course where no application for substitution of any legal representative to prosecute the suit/appeal is filed within the period of limitation i.e. ninety days, and no order is required to be passed in that regard. The Court may however make a declaration to that effect. Order 43 rule 1(k) envisages order refusing to set aside the abatement or dismissal of the suit. There was no such

application for setting aside the abatement which could be rejected. As a matter of fact, the application for substitution had been filed within a month i.e. well within the period of limitation, and therefore the question of abatement did not arise at all. By the time the application came up for disposal, the period of ninety days had expired and since the appellant's application was rejected in absence of legal representatives of the deceased appellant on record, the appeal was held to have abated.

The point for consideration is where the rejection of the application for substitution is found to be not in accordance with law and the order to that effect is set aside and the application is allowed with the result that the appellant stands substituted in place of Narbada Devi, no question of abatement of the suit would arise. The latter part of the order being mere consequential would be rendered nonest.

The locus standi of the appellant to prosecute the appeal on behalf of Narbada Devi cannot be doubted. He claims to be a legatee under Will duly attested by the Notary Public. It is not in dispute that in the State of Rajasthan it is not necessary to obtain probate or letters of administration of the Will as otherwise required under Section 213 of the Indian Succession Act. It is to be kept in mind, as indicated above, that the

ground of eviction was the personal necessity of the appellant. In other words, the suit was filed for his benefit.

It was submitted on behalf of the respondent that Narbada Devi had left behind other legal representatives who should have been substituted even as proforma appellants/respondents. The submission, we are afraid, does not lie in the mouth of the respondent as he is just a tenant in the suit premises. Prima facie, the appellant acquired right/title on the basis of Will to the exclusion of other legal representatives. In any view, it is for other legal representatives to dispute his right and title. It is well settled that order of substitution does not decide right, title of the parties; it merely enables the person to prosecute the suit or appeal-in the case of plaintiff/appellant-or to contest the suit/appeal in the case of defendant/respondent–as the case may be. The application if allowed would simply enable the appellant to prosecute the appeal. We are satisfied that by reason of the Will he had acquired the right to continue the proceeding.

In the above premises, the order of the trial court cannot be sustained and the learned Single Judge therefore committed error in declining to interfere with the same.

Consequently, the order of the trial court dated 26.7.2006 as well as the order of the learned Single Judge dated 13.10.2006 are set aside. The trial court will pass consequential orders.

[MOHAMMAD RAFIQ],J. **[S.N.JHA],CJ.**

Praveen